(6)

No. 94-7427

In The

Supreme Court of the United States

October Term, 1995

JOSEPH V. LIBRETTI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether Rule 11(f) of the Federal Rules of Criminal Procedure requires the district court to determine if there is a factual basis for a defendant's plea to a criminal forfeiture charged in an indictment or information.

2. Whether a defendant who pleads guilty waives the right to a special verdict on forfeiture under Rule 31(e) of the Federal Rules of Criminal Procedure and the Sixth Amendment when the defendant was not advised of this right and never explicitly waived it.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (J.A. 313) is reported at 33 F.3d 523. The order of the district court for the District of Wyoming (J.A. 155) is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on October 19, 1994. J.A. 313. The petition for a writ of certiorari was filed on December 27, 1994, and was granted on March 27, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 11(f) of the Federal Rules of Criminal Procedure provides:

> (f). Determining the Accuracy of the Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

The Sixth Amendment of the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law * * * .

The pertinent portions of Rules 7, 11, 23, 31, 32, and 54 of the Federal Rules of Criminal Procedure, and 21 U.S.C. § 853(a), (n) and (p) are reprinted *infra* at App. 1-6.

STATEMENT

The district court accepted petitioner's guilty plea to the continuing criminal enterprise (CCE) count of a multicount

indictment. The plea was based upon a plea agreement that included a forfeiture provision. At sentencing the court rejected petitioner's objection that the government had not shown a factual basis for the forfeiture. Petitioner appealed from the forfeiture order, and also reiterated his objections in the district court. The district court amended its forfeiture order, holding that a fact-finding hearing would be necessary to determine whether all of the assets covered in the order were subject to forfeiture. This order was stayed pending the appeal. The court of appeals concluded that the district court lost jurisdiction once the notice of appeal was filed, and the appeals court affirmed the original forfeiture order.

The Indictment

On May 22, 1992, the grand jury in the district of Wyoming returned an eleven-count superseding indictment charging petitioner with drug, weapons, and money-laundering offenses. J.A. 38-71. Count 6 of the indictment,[1] to which petitioner ultimately pleaded guilty, charged that from 1984 to 1992 petitioner engaged in a continuing criminal enterprise. J.A. 56-63; *see* 21 U.S.C. § 848. The indictment charged that petitioner operated a cocaine and marijuana distribution organization in Wyoming and Colorado, and that he used his federal firearms license to launder drug proceeds by purchasing firearms.

Count 6 called for the forfeiture of "all property of any kind constituting or derived from proceeds" petitioner obtained by engaging in the CCE, and "all property of any

[1] The other charges were conspiracy to possess cocaine and marijuana with intent to distribute in violation of 21 U.S.C. § 846 (Count 1); use of firearms in relation to a drug trafficking felony in violation of 18 U.S.C. § 924(c) (Count 2); interstate travel to facilitate drug dealing in violation of 18 U.S.C. § 1952(a)(3) (Count 3); unlawful possession of a machine gun in violation of 18 U.S.C. § 922(o)(1) (Count (4); using drug proceeds to operate a business in violation of 21 U.S.C. § 854 (Count 5); money laundering in violation of 18 U.S.C. § 1956(a)(B)(i) (Counts 7 & 8); obstruction of justice in violation of 18 U.S.C. § 1503 (Counts 9 & 10); and possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(A)(1). J.A. 38-71.

kind" used or intended for use to facilitate the enterprise, including but not limited to the following: a parcel of land in Star Valley, Wyoming; a car and a truck; $102,360 in currency allegedly received in exchange for controlled substances and spent or disposed of; $7,635 petitioner sent to Dee Smith; $12,000 in cash that had been stored in petitioner's home; all currency and travelers' checks recovered from petitioner's person, office, home, gun safes, or lockers; a diamond ring and wedding band; a mobile home; a computer; two GNMA certificates; an investment account holding municipal bonds; three cashier's checks totaling $3,682; and the contents of two safe deposit boxes. J.A. 64-67.

The Plea Agreement and the Rule 11 Hearing

After several days of trial, on October 5, 1992, petitioner appeared before the district court to enter a guilty plea. J.A. 84.

The plea agreement

The plea agreement included petitioner's agreement to plead guilty to a CCE under Count 6, and the government's agreement to recommend at sentencing that petitioner receive not more than the mandatory minimum sentence of 20 years required by 21 U.S.C. § 848. J.A. 79-80.[2]

Paragraphs 2, 9, and 10 dealt with forfeiture. With regard to forfeiture, paragraph 2 of the agreement stated (J.A. 79):

> The maximum statutory penalty for the offense is life imprisonment, not more than a $2,000,000 fine, or both, a $50 mandatory special assessment, and forfeiture of all known assets as prescribed in 21 U.S.C. § 853 and assets which are discovered at any later time up to $1,500,000.

Paragraph 9 stated (*id.*) that petitioner agreed to "identify all assets that were used to facilitate his criminal activity," and to

[2] The agreement also recited petitioner's acknowledgment that he had read the agreement and the indictment, that the charges had been fully explained to him by his attorney, and that he understood the nature and elements of the offenses with which he was charged and the maximum and minimum penalties. J.A. 80.

"provide complete financial disclosure forms requiring the listing of assets and financial interests." Paragraph 10 stated (J.A. 81) that petitioner agreed

> to transfer his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General including, but not limited to: all real estate; all personal property, including guns, the computer, and every other item now in the possession of the United States; all bank accounts, investments, retirement accounts, cash, cashier's checks, travelers [sic] checks and funds of any kind.

The Rule 11 hearing

The district court advised petitioner of the various procedural rights he would be waiving. The court stated (J.A. 87):

> Now, if you plead guilty, it's going to be the end of this trial. We're not going to go through with this until the end of this week, or next weeks [sic], and the jury is not going to decide whether you're guilty or not. I'll dismiss them after this, and that will be that.

In describing the maximum and minimum sentences, the court advised that in addition to the mandatory sentence of imprisonment, "all the property that's described in this Count 6 could be forfeited to the United States." J.A. 88.

In response to the question whether he understood the consequences of the agreement, petitioner asked whether the statement that the government could forfeit "one and a half million dollars from me any time," meant that even a salary earned twenty years in the future might be forfeited. J.A. 88. The court responded that later-acquired property that was not drug-tainted would not be forfeited, but if drug-tainted property came to light later, it would be forfeited. J.A. 89. After that exchange, the court again asked petitioner if he understood his rights, and petitioner replied that he did. J.A. 90. The court then read Count 6, including the forfeiture allegations, and petitioner stated that he understood it. J.A. 90-98.

Petitioner acknowledged that he had read the plea agreement and said that he understood it. J.A. 98. After petitioner was placed under oath, the court asked (J.A. 100):

> Do you understand that all of your property could be forfeited, the property that is owned by you by reason of any drug transaction?

Petitioner responded in the affirmative. *Id.*

Petitioner stated that he was pleading guilty because of the strength of the government's case, and because of a desire to relieve family members of the need to testify. J.A. 101-02, 119-20. Upon determining that petitioner admitted that he was guilty of some of the incidents related in Count 6 but not others, the court reviewed each allegation in that count with petitioner. J.A. 102-119. While petitioner disagreed with many of the amounts and dates for the transactions listed in paragraphs 1-26 of Count 6, the court summarized this discussion with the comment that petitioner agreed the charge was "substantially true except for the details" noted. J.A. 118.

The court then accepted the plea, finding it was voluntary and supported by a factual basis, and approved the plea agreement. J.A. 121.

Sentencing

Petitioner appeared for sentencing on December 23, 1992. J.A. 136. The court sentenced petitioner to twenty years of imprisonment, five years of supervised release, a $5,000 fine, a $50 special assessment, and 500 hours of community service. J.A. 165-70. On motion of the United States, the court granted an order of forfeiture. The court stated (J.A. 150), "I think that I have no alternative but to grant the forfeiture order and it is hereby granted."

When the court wished petitioner good luck and remanded him to the marshal, petitioner asked, "Are we over?" J.A. 153-54. When the court replied "I think so,' petitioner responded, "I would just like to object to what I see as a failure to find any factual basis for the whole forfeiture, just for the record." J.A. 154. The court noted the objection and stated that "the evidence that I heard before me in the two

days of trial I think is sufficient to warrant the granting of forfeiture. I think I have no alternative." *Id.*

The Entry of Judgment and the Notice of Appeal

The court entered the forfeiture order and the judgment of conviction on December 23, 1992. J.A. 155-164, 165-70. On December 29, 1992, petitioner filed a notice of appeal from the forfeiture order. J.A. 3.

The Post-Trial Proceedings in the District Court

1. The district court held the first hearing on third-party claims to forfeited property on February 9, 1993. J.A. 173-83. At the beginning of the hearing the government raised the question whether a condominium included in the forfeiture order could be sold immediately, with the consent of the co-owner, to prevent foreclosure. J.A. 173. The court asked petitioner whether he had any objections, and petitioner objected that the condominium should not have been included in the forfeiture order because it was not the proceeds of any drug offense. J.A. 174-75. The court allowed the sale, provided that the proceeds be retained to permit petitioner to assert any claims he might have. J.A. 176. The court then deferred consideration of other claims until additional notice had been given.

2. On March 26, 1993, the district court held a second hearing on third-party claims and also heard petitioner's claims. J.A. 184-297.

The third-party claims

Third-party claimant Claudia Porter stated that in 1990 she received a diamond engagement ring from petitioner. J.A. 184. The court found that the ring had been purchased with legitimate funds, and that Porter was an innocent owner. J.A. 306.

Beverly Libretti, petitioner's mother, appeared representing herself and her husband. She asserted claims to two bank accounts that had been owned jointly by petitioner and his parents. J.A. 187-204. She stated that one account was opened

when her son was a small child, and that it held his birthday, confirmation, and allowance money. J.A. 188-89. The last deposit in this account was made in 1975. J.A. 198-99. They opened the second account in another bank when her son was in high school, so that he could ride his bike there to make deposits. J.A. 189. The last deposit in this account was made in 1981. J.A. 201-02. The court found that the proceeds in these accounts were not traceable to drug transactions, and that they should be returned to petitioner's parents, who were joint tenants with a right of survivorship. J.A. 307-08.

Mrs. Libretti also made a claim to a parcel of real estate in Star Valley, Wyoming, which her son had deeded to his father in return for the moneys his parents paid for his defense. J.A. 190-91, 194-97. She stated that she and her husband were aware of their son's legitimate sources of income from his employment, that they knew nothing about any drug transactions before the charges in this case were filed, and that they had no knowledge that any drug proceeds might have been used to purchase this land. J.A. 191. She acknowledged that she and her husband had not purchased the land from their son, but stated that petitioner had intended it as payment for the money they had provided for his defense. J.A. 190-91, 195. The court reserved ruling on this claim. J.A. 307.

The government's case

Tony Young, a special agent for the Wyoming Attorney General, testified for the government. J.A. 204-251. Agent Young testified to various expenditures by petitioner over a period of years in excess of his reported income (J.A. 204-11), to interviews with codefendants who described petitioner's cocaine purchases and storage of cash (J.A. 212), to conversations with Claudia Porter in which she reported seeing petitioner with large sums of money that she later believed to be drug proceeds (J.A. 213-17, 220-22), and to petitioner's use of safe deposit boxes to store moneys related to drug trafficking (J.A. 223-29). Based on his estimates of the quantity of drugs involved and the financial records he examined, Young estimated that from 1981 to 1991 petitioner

had drug-trafficking profits of one million dollars or more. J.A. 237-38.

Petitioner's claims

Petitioner sought to show that he had substantial non-tainted funds, and that the government had seized both tainted and nontainted property. For example, petitioner testified that only a small fraction of the moneys in his Wyochem account were drug moneys, and that there were sufficient legitimate funds from his employment to cover the check he wrote on that account to purchase the Star Valley lot. J.A. 265-67. Petitioner testified that his salary from General Chemical, where he was employed as an accounting supervisor, was $48,775 in 1989 and increased to $53,000 by 1991. J.A. 262-64. Petitioner's lack of access to his financial records prior to the hearing and the court's refusal to allow him to subpoena witnesses hampered this presentation. *See* J.A. 265-66, 270, 276-77, 283, 294-95.

The court stated that it was "convinced" by petitioner's presentation, and would remand the case to a magistrate judge for a determination whether the property the government was forfeiting was "tainted or not." J.A. 281. The court ordered that petitioner could subpoena the necessary information, and that his prior counsel, who had his financial records, should deliver those to him immediately. J.A. 284.

On April 2, 1993, the court entered an order amending its December 23 forfeiture order in accordance with the conclusions reached at the March 26 hearing. J.A. 298-312. The order stated the court's determination "that it may be unjust to enforce the specific forfeiture provisions of the plea agreement," "[s]ince forfeiture statutes do not mandate forfeiture of property purchased with legitimate funds." J.A. 309. The court also observed that "a defendant's concession in a plea agreement to the forfeiture of his property 'does not make it so.' " *Id.* (citations omitted). Accordingly, the court ordered the magistrate judge to hold a fact-finding hearing at which petitioner would have the burden of proving by a preponderance that his property is not subject to forfeiture. J.A. 310.

The district court later granted the government's motion to stay the fact-finding hearing pending the appeal. J.A. 317.

The Court of Appeals[3]

The court of appeals first concluded (J.A. 317-19) that the district court's actions subsequent to the filing of the notice of appeal had not deprived the appellate court of its jurisdiction. The court of appeals held that the district court had no jurisdiction to consider the petitioner's claims once he had filed a notice of appeal from a final judgment. J.A. 318-19.

On the merits, the court of appeals held that the district court is not required to find a factual basis for forfeiture under Fed. R. Crim. P. 11(f). J.A. 321-23. The court reasoned that forfeiture under 21 U.S.C. § 853 is a part of the sentence, not a part of the substantive offense. J.A. 322. Therefore, the forfeiture provision was a sanction to which the parties had agreed as a consequence of petitioner's plea, not a plea to a substantive charge. *Id.*

Noting that a lawful plea agreement is enforceable, the court concluded that petitioner was bound by the terms of his plea agreement. J.A. 322-26. The court rejected petitioner's claim that the plea agreement was vague and ambiguous, and that he did not knowingly and voluntarily agree to forfeit all of his property. J.A. 323-26. The court stated that the district court had thoroughly assessed whether petitioner understood the consequences of his plea, and that petitioner had received a favorable plea bargain. J.A. 324-25. The court found "[n]othing in the record" to suggest that petitioner's plea would have been different if he had been questioned further about the forfeitability of his assets. J.A. 324.

The court recognized that the district court had made some statements at the Rule 11 hearing that suggested a narrower scope for the forfeiture. In particular, the district court had made "statements that defendant was only forfeiting

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[3] Petitioner filed several pro se notices of appeal. In addition to the present appeal challenging the forfeiture order (No. 93-8000), he appealed the fine and community service ordered by the district court (No. 93-8001), and the April 2, 1993 ruling, which, *inter alia*, ordered further fact-finding on the forfeiture issues but denied petitioner's post-sentence motions for return of property and denied a stay of execution of the forfeiture order (No. 93-8029).

assets listed in the CCE count of the indictment or from his drug trade." J.A. 325. The court of appeals characterized these statements by the district judge as "extraneous" and concluded that they failed to establish that petitioner had not knowingly and voluntarily agreed to forfeit all of his assets. *Id.* This part of the court's opinion makes no reference to petitioner's objection at the sentencing hearing to the lack of a factual basis for the forfeiture order.

The court of appeals also rejected petitioner's claim that he was not advised of and did not waive his right to a jury trial on the forfeiture issues. J.A. 326-28. The court found it unnecessary to decide whether there is a constitutional right to a jury trial on forfeiture issues because petitioner had a statutory right to a jury determination under Fed. R. Crim. P. 31(e). J.A. 327. The court concluded that petitioner knowingly and voluntarily waived this right. J.A. 327-28. The court recognized that petitioner had not been specifically advised that he would be waiving his right to a jury trial on the forfeiture issues if he pleaded guilty, but it concluded that no specific reference was necessary "in light of the unambiguous plea agreement and defendant's knowing and voluntary plea." J.A. 328.

SUMMARY OF ARGUMENT

1. When a defendant pleads guilty, Rule 11(f) of the Federal Rules of Criminal Procedure requires the court to "satisfy itself that there is a factual basis for the plea" before the entry of judgment. If the case involves criminal forfeiture, Rule 11(f) should require a factual basis for both components of the plea: (1) the defendant's admission that he committed an offense charged in the indictment, and (2) the defendant's admission that some or all of the property named in the indictment is subject to forfeiture.

Requiring a factual basis for the forfeiture component of the plea is necessary to carry out the core function of Rule 11: assuring that the plea is knowing, intelligent, and voluntary. If the court finds that there is no factual basis for the forfeiture to which a defendant has agreed, this is a strong indication

that his plea is not knowing and intelligent. In such a case, the defendant may not have understood that neither what he has admitted nor what the government can prove would establish a basis for forfeiture, and he may have agreed to the forfeiture because of this fundamental misunderstanding.

The factual basis inquiry should also bring to light any misunderstanding by the defendant regarding the scope of the forfeiture to which he has agreed. A plea is not knowing and intelligent unless a defendant understands the direct consequences of his plea, and criminal forfeiture is one of the most significant direct consequences of the plea. That is certainly the case here, where the plea agreement has been interpreted as allowing forfeiture of *all of the defendant's property*, including substantial legitimate income and other admittedly untainted property.

A factual basis inquiry under Rule 11(f) is also a necessary correlative to Rules 7, 31, and 32 of the Federal Rules of Criminal Procedure, which establish the procedural framework for criminal forfeiture. These rules require that criminal forfeiture be charged in the indictment, found by the jury in a special verdict, and recorded in a judgment of forfeiture. These rules reflect a decision to treat forfeiture as a substantive charge or element of criminal liability, not merely as a matter of sentencing. Indeed the Criminal Rules Advisory Committee rejected a draft that would have treated forfeiture as a matter to be dealt with by the judge at sentencing, adopting instead the common law practice of providing the defendant with notice in the indictment and a special jury verdict. Given the heightened procedural safeguards for criminal forfeiture, including the requirement of a special jury verdict, Rule 11(f) should be interpreted to require the court to assure itself that there is at least a factual basis for a plea to a forfeiture charge. That logic applies with special force where, as here, the government seeks to forfeit *all of* the defendant's assets, including substantial assets that were legitimately acquired.

Finally, requiring a showing of a factual basis under Rule 11(f) is necessary to ensure that criminal forfeiture does not exceed the limitations established by Congress. Federal law

does not authorize forfeiture of estate. Forfeiture is statutorily authorized only where the prosecution can prove a connection between the assets sought to be forfeited and the underlying offense. This is true even in the case of substitute assets, which may be forfeited only upon a showing that there were tainted assets and a further showing that those tainted assets cannot be reached by the forfeiture order. Unless the government can establish that it is a substitute asset, property that has no connection with the offense is not subject to forfeiture under federal law. The factual basis inquiry will provide some assurance that this limitation is observed in guilty plea cases.

This assurance is sorely needed. History teaches that the government may abuse forfeiture authority. The severe sentences under the federal drug laws give the prosecution enormous leverage, and there is a real danger that federal prosecutors will employ their charging and bargaining authority to pressure defendants to give up their right to property that is not forfeitable under federal law. Interpreting Rule 11(f) to require a factual basis inquiry will deter prosecutorial efforts to forfeit property for which there is no statutory mandate. The factual basis inquiry will also provide a degree of protection for third parties whose rights may be adversely affected by entry of a forfeiture order pursuant to a plea agreement.

2. Rule 31(e) of the Federal Rules of Criminal Procedure requires a special jury verdict on "the extent of the interest subject to forfeiture, if any." This rule stands on both a common law and a constitutional foundation, and any waiver of this right must be the intentional relinquishment of a known right.

The historical record demonstrates that at common law in England and the American colonies the question of the nature and extent of property subject to forfeiture was submitted to the petit jury. The legislative history of Rule 31(e) reveals that the Rules Advisory Committee intended the special jury verdict provision to adopt the common law procedure.

Rule 31(e) also stands on a constitutional foundation. This Court's decisions teach that the Sixth Amendment guarantees a jury trial in cases where it would have been available

at common law, and explain that the purpose of the right is to prevent government oppression and to provide a safeguard against a corrupt or overzealous prosecutor. Given the common law tradition of submitting the issue of forfeiture to the petit jury and the potential for governmental abuse of forfeiture, the right to a jury trial on forfeiture must be guaranteed under the Sixth Amendment.

A waiver of the constitutional and statutory right to a jury trial on criminal forfeiture must be knowing and intelligent, and should be explicit as well. This Court's prior decisions require that the waiver of the Sixth Amendment right to trial by jury be knowing and intelligent. Rule 23(a) of the Federal Rules of Criminal Procedure implements the constitutional standard for waiver, requiring that the defendant personally waive the right to a jury trial in writing.

Whether judged by constitutional standards or by Rule 23(a), the waiver of the right to a jury trial and special verdict on forfeiture under Rule 31(e) must be knowing and intelligent. This standard is not met merely because a defendant has tendered a guilty plea. A plea of guilty does not necessarily waive the right to have a jury determine the issue of forfeiture. To the contrary, the lower courts have recognized that a defendant may enter a plea of guilty but insist on a trial of the forfeiture issue to the jury, just as he might plead guilty on one count but go to trial on another.

Nor is it sufficient for the defendant to make a general waiver of the right to a jury trial if he was not aware of his right to have a jury determine what property, if any, would be subject to forfeiture. Absent some evidence that the defendant was advised of his rights under Rule 31(e) and the Sixth Amendment, the defendant's statement that he waives his "right to a jury trial" does not establish a knowing waiver of the right to have a jury determine the issue of forfeiture. This is particularly true where, as here, the court specifically advises the defendant that pleading guilty means that the jury will not decide the issue of guilt or innocence.

Absent evidence of the defendant's awareness of the right to a jury determination of the extent of any property subject to forfeiture, any purported waiver could not be knowing or

intelligent. In the absence of such a valid waiver, a judgment of forfeiture is invalid.

ARGUMENT

I. RULE 11(f) REQUIRES THE DISTRICT COURT TO SATISFY ITSELF THAT THERE IS A FACTUAL BASIS FOR THE FORFEITURE COMPONENT OF A GUILTY PLEA.

Fed. R. Crim. P. 11(f) provides that a court that has accepted a guilty plea shall not enter judgment "without making such inquiry as shall satisfy it that there is a factual basis *for the plea*." (Emphasis added). The question in this case is whether forfeiture is included in "the plea" as that term is used in Rule 11(f). On its face, the unqualified language of Rule 11(f) reaches both components of petitioner's plea: (1) his admission that he committed an offense charged in the indictment, and (2) his admission that the property named in the indictment was subject to forfeiture. *Cf. North Carolina v. Alford*, 400 U.S. 25, 32 (1970) (recognizing that a guilty plea is typically composed of two elements, the defendant's admission that he committed the offense charged and his consent that judgment be entered without a trial of any kind).

A. Rule 11(f) Requires an Inquiry Into the Factual Basis for the Elements of the Offense to Ensure that Each Plea is Knowing, Intelligent, and Voluntary.

Rule 11(f) is an important part of the set of procedures designed to ensure that a defendant like petitioner who enters a guilty plea does so knowingly, intelligently, and voluntarily. The Advisory Committee Notes to Rule 11(f) specifically state that the principal purpose of the factual basis requirement is to bring to light cases in which the defendant's plea is not knowing and intelligent. As the Notes explain:

> [The factual basis] inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.

18 U.S.C. App., Notes of Advisory Committee on Rules – 1966 Amendment. The Notes also state that the district court should satisfy itself "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." *Id.* The factual basis requirement thus supplements other provisions of the 1966 amendments, which require the court to address the defendant personally and determine that the plea is knowing and voluntary. *See id.*

This Court has recognized the vital role the factual basis inquiry plays in ensuring that pleas are knowing and voluntary. In *North Carolina v. Alford*, 400 U.S. at 38, this Court stated that the evidence of the defendant's guilt "provided a means by which the judge could test whether the plea was being intelligently entered." Similarly, in *McCarthy v. United States*, 394 U.S. 459, 465 (1969) (footnote omitted), which involved multiple Rule 11 violations including the failure to inquire into the factual basis for the defendant's plea, this Court explained that the Rule 11 procedure "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary."

B. Because the Federal Rules of Criminal Procedure Treat Forfeiture as an Element of Criminal Liability, Rule 11(f) Requires an Inquiry Into the Factual Basis for the Forfeiture Component of a Guilty Plea.

1. The Federal Rules of Criminal Procedure treat criminal forfeiture as an element of criminal liability.

Congress enacted two major forfeiture provisions in 1970,[4] and a group of amendments to the Federal Rules of

[4] These procedural innovations were part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 943, *codified as* 18 U.S.C.

Criminal Procedure were adopted in 1972 to implement the legislation. The new rules reflect a deliberate choice to accord criminal forfeiture the same status and procedural protections accorded to the elements of a criminal offense, rather than to treat it as a part of sentencing.

The Reporter for the Advisory Committee on Federal Rules presented two alternative drafts, requiring the Committee to decide how to characterize forfeiture for procedural purposes. One draft "authorize[d] the judge to determine the amount of a criminal forfeiture as part of the sentencing procedure." Memorandum from Frank J. Remington, Reporter, To Advisory Committee on Federal Rules of Criminal Procedure 1 (Aug. 6, 1971), *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-88 CM-4115-71 (Congressional Information Service). The second draft amended Rules 7, 31, 32, and 54 in accordance with the view that "a criminal forfeiture is an element of criminal liability entitling the defendant to notice, trial, and a special jury finding." *Id.*[5] The reporter noted that research by the Library of Congress supported this latter view. *Id.* at 1-2.[6]

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§ 1963 (RICO), and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408(a)(2), 84 Stat. 1236, 1265-66, *codified as* 21 U.S.C. § 848 (CCE). The Senate report accompanying RICO characterized criminal forfeiture as "an innovative attempt to call on our common law heritage to meet an essentially modern problem." S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969). The enactment of the RICO forfeiture provision in 1970 (followed closely by the CCE forfeiture provision) marked the first significant federal legislation authorizing forfeiture since 1790, when the first Congress enacted legislation abolishing forfeiture of estate and corruption of the blood. *Id.* at 80; *see infra* pp. 29-30 and n. 23.

[5] Fed. R. Crim. P. 54 was amended to add the word "civil" before the word "forfeiture" in the list of proceedings exempted from the criminal rules, making it plain that the rules apply to criminal forfeiture. 18 U.S.C. App., Notes of Advisory Committee on Rules – 1972 Amendment.

[6] Indeed, this evidence apparently persuaded the Committee to alter its preliminary decision "that the amount of the criminal forfeiture could properly be decided, by the judge, as a matter of sentencing rather than requiring the amount of the criminal forfeiture to be pleaded, proved, made a special verdict, and made part of the judgment." *See* Memorandum from Frank J. Remington, *supra*, at 1.

The text of the final Rules and the Committee's explanatory notes adopt the second view, that forfeiture is an element of criminal liability rather than merely a matter of sentencing.[7] The Federal Rules require criminal forfeiture to be alleged in the indictment or information, found by a special jury verdict, and reflected in a separate judgment. The Rules thus draw a sharp distinction between criminal forfeiture and other issues that are relevant only to sentencing and not subject to these heightened procedural safeguards.[8]

The charging provisions of Federal Rule 7 were amended in 1972 to add subsection (c)(2), which provided that "[w]hen an offense charged may result in a criminal forfeiture, the

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Petitioner has been unable to locate the Library of Congress report referred to in the reporter's memorandum.

[7] As this Court stated last Term, where "Congress did not amend the Advisory Committee's draft in any way . . . 'the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted.' " *Tome v. United States*, 115 S. Ct. 696, 702 (1995) (plurality opinion) (citation omitted); *see id.* (Advisory Committee Notes are "useful guide in ascertaining the meaning of the Rules"); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988) (Advisory Committee Note, "although not determinative, is 'of weight' in our construction of the Rule") (citation omitted); *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) ("construction given by the Committee is 'of weight' ") (citation omitted); *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 429 (1983) (Advisory Committee Notes "potent evidence").

[8] This is not to deny that forfeiture is imposed at sentencing and treated, for some purposes, as a sentence. *See, e.g.*, 21 U.S.C. § 853(a) ("in imposing sentence" court shall order forfeiture as provided by that section "in addition to any other sentence imposed"). Moreover, petitioner acknowledges that forfeiture, civil as well as criminal, operates as a punishment. *See, e.g., Austin v. United States*, 113 S. Ct. 2801, 2810-12 (1993) (civil forfeiture under 21 U.S.C. §§ 881(a)(4) & (a)(7) is punishment for purposes of excessive fines clause). *Austin* recognizes that the forfeiture provisions enacted in 1970 are not subject to simple characterizations. Though civil forfeiture does not require all of the safeguards that attend a criminal proceeding, it may nonetheless constitute punishment for purposes of the excessive fines clause. *See id.* Criminal forfeiture also defies easy characterization. The Federal Rules of Criminal Procedure treat criminal forfeiture like an element of an offense, according it the safeguards of notice by indictment and jury fact-finding, though criminal forfeiture also operates as a punishment imposed at the time of sentencing.

indictment or information shall allege the extent of the interest or property subject to forfeiture." Amendments to the Federal Rules of Criminal Procedure, 56 F.R.D. 143, 156 (1972). The Advisory Committee Notes state that this amendment was "intended to provide procedural implementation of the recently enacted criminal forfeiture provision[s]" of RICO and CCE. 18 U.S.C. App., Notes of Advisory Committee on Rules – 1972 Amendment. The Notes further state that Congress viewed the new forfeiture provisions as "reestablishing a limited common law criminal forfeiture." *Id.* The Advisory Committee Notes explain the rationale for this amendment to Rule 7:

> Under the common law, in a criminal forfeiture proceeding the defendant was apparently entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction. Subdivision (c)(2) provides for notice.

Id.

Rule 31(e) was adopted at the same time. It requires a "special jury verdict" regarding "the extent of the interest or property subject to forfeiture, if any." Amendments to the Federal Rules of Criminal Procedure, 56 F.R.D. at 159. The Advisory Committee Note accompanying this provision cross-references to the Note that accompanied Rule 7(c)(2) and states that "[t]he assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an *element of the offense* to be alleged and proved." 18 U.S.C. App., Notes of Advisory Committee on Rules – 1972 Amendment (emphasis added).[9]

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[9] One Ninth Circuit opinion has characterized this statement in the Advisory Committee Notes as "incorrect," *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1578 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990), and several other lower court decisions have disregarded the Note, *e.g.*, *United States v. Elgersma*, 971 F.2d 690, 693 (11th Cir. 1992) (en banc). As discussed in footnote 12, *infra* p. 20, these cases hold that the burden of proof in criminal forfeiture proceedings turns on a statutory presumption not involved in this case, and they should be accorded no weight here.

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Rule 32 was also amended in 1972 to provide for forfeiture, and the structure of the amended rule clearly distinguished between forfeiture and sentencing. Rule 32(b)(1) provided for the "judgment of conviction," which "shall set forth . . . the adjudication and sentence." Amendments to the Federal Rules of Criminal Procedure, 56 F.R.D. at 160. This provision did not include forfeiture. Forfeiture was addressed separately in Rule 32(b)(2), which provided for "the judgment of criminal forfeiture." *Id.*

Rules 7 and 32 have been amended to make slight changes in the language adopted in 1972, but these amendments do not change the treatment of forfeiture.[10] Indeed, the amendment to Rule 7(c)(2) strengthens the protection provided for criminal forfeiture by explicitly stating that "[n]o judgment of forfeiture may be entered" unless the forfeiture was alleged in the indictment.[11]

Thus the overall structure of the Federal Rules of Criminal Procedure demonstrates that the court of appeals erred in characterizing forfeiture as "a part of the sentence, not a part of the substantive offense." J.A. 322. To the contrary, as this Court recognized in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 628 n.5 (1989), the Federal Rules treat

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[10] Rule 32 was amended in 1994 to incorporate the " 'Model Local Rule for Guideline Sentencing' " and to reorganize the subsections in sequence. Notes of Advisory Committee on Rules – 1994 Amendment. The provisions of Rule 32(b) quoted above were moved to subsection (d) of the amended Rule and were slightly reworded. Although subsection (d) still separates the discussion of the "judgment of conviction" in subsection (d)(1) from the discussion of forfeiture in subsection (d)(2), subsection (d)(2) no longer includes the phrase "judgment of forfeiture." The Advisory Committee Note indicates no intention to make any substantive change; it states that "[s]ubdivision (d), dealing with entry of the court's judgment, is former subdivision (b)." *Id.* Rule 7(c)(2) still employs the phrase "judgment of forfeiture."

[11] Rule 7(c)(2) was amended to its present form in 1979. It now provides:

> No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

The amendment was intended to clarify the meaning of the rule. *See* 18 U.S.C. App., Notes of Advisory Committee on Rules – 1979 Amendment.

forfeiture as "a substantive charge in the indictment against a defendant."

2. Rule 11(f) requires the court to satisfy itself that there is a factual basis when a defendant's plea includes forfeiture.

The characterization of forfeiture as an element of criminal liability, which governs the charges, the verdict, and the judgment in federal criminal cases, should govern plea proceedings under Rule 11 as well. Forfeiture must be pleaded like a separate charge under Rule 7(c)(2), must be the subject of a special jury verdict under Rule 31(e), and is recorded as a judgment under Rule 32(d). The requirement that there be a factual basis for a guilty plea to a forfeiture charge is a necessary correlative to the procedural protections for criminal forfeiture afforded in Rule 7(c)(2), Rule 31(e), and Rule 32(d).[12]

Rule 31(e), which deals with fact finding in criminal forfeiture cases, is especially pertinent to the proper

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[12] As explained in note 9, *supra* p. 18, these provisions do not necessarily mean that criminal forfeiture must be treated *for all purposes* as if it were an element of the offense. For example, acceptance of petitioner's arguments in the present case would not determine other issues, such as the standard of proof governing criminal forfeiture. A number of lower courts that have considered the standard of proof governing criminal forfeiture under section 853 have concluded that the standard is a preponderance, rather than beyond a reasonable doubt, because forfeiture is a criminal punishment, part of the sentence, rather than part of the definition of the offense. *E.g.*, *United States v. Elgersma*, 971 F.2d 690 (11th Cir. 1992) (en banc); *United States v. Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990). These decisions find that the section 853(d) statutory presumption adopted in 1984 supports the view that the standard of proof is a preponderance. Assuming arguendo that they are correct, they deal with questions that are quite distinct from the proper interpretation of Rule 11(f). The Rules of Criminal Procedure do not address the standard of proof for forfeiture cases. A conclusion that Congress lowered the burden of proof to a preponderance in 1984 would in no way cast doubt on the need for a factual basis finding under Rule 11(f), an issue that was not considered by Congress in 1984. The dispute in the present case concerns the interpretation of Federal Rules adopted more than a decade earlier. By the same token, a decision in petitioner's favor does not foreclose the argument that section 853 adopted a preponderance standard.

characterization of criminal forfeiture under Rule 11(f) and the question whether forfeiture should be treated as one of the elements which may be encompassed in a plea. It would be remarkable if the relatively minimal showing required by Rule 11(f) – "a factual basis" – were deemed inapplicable to forfeiture despite the extraordinary protection of a special jury verdict in Fed. R. Crim. P. 31(e). Because Rule 31(e) requires a special jury verdict on forfeiture, a forfeiture allegation in an indictment operates like an additional criminal charge, not a mere sentencing provision. A trial and special verdict are still required if the defendant pleads guilty but contests the government's forfeiture claims,[13] just as they would be required if the defendant pleaded guilty to one count but not guilty on other counts. In effect, there are two separate components to a guilty plea in a case involving criminal forfeiture; a defendant must enter pleas – and may enter different pleas – to each component of the case. In contrast, other aspects of non-capital sentencing do not require a jury verdict, and a guilty plea terminates the trial even if it leaves the sentence unresolved.

C. An Inquiry Into the Factual Basis for Forfeiture is Necessary to Determine Whether a Plea is Knowing and Intelligent.

Applying the factual basis inquiry to criminal forfeiture will carry out the core function of Rule 11: ensuring that pleas are knowing and intelligent waivers. The factual basis

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[13] *See, e.g.*, *United States v. McKeithen*, 822 F.2d 310 (2d Cir. 1987) (forfeiture case tried to jury after defendant pleaded guilty to CCE charge). Many circuit have approved the use of bifurcated guilt and forfeiture proceedings, and some circuits require them. *Compare United States v. Sandini*, 816 F.2d 869, 874 (3rd Cir. 1987) (bifurcation required) *and United States v. Feldman*, 853 F.2d 648, 662 (9th Cir. 1988) (requiring separate jury instructions, deliberations, and closing arguments, but declining to require separate evidentiary hearings in all cases), *cert. denied*, 489 U.S. 1030 (1989) *with United States v. Jenkins*, 904 F.2d 549, 557-58 (10th Cir.) (bifurcation not required if defendant does not advise court of wish to testify on forfeiture issues), *cert. denied*, 498 U.S. 962 (1990) *and United States v. Perholtz*, 842 F.2d 343, 367-68 (D.C. Cir.) (per curiam) (declining to adopt blanket rule), *cert. denied*, 488 U.S. 821 (1988).

inquiry will bring to light cases in which what the defendant admits (or what the government offers to prove) is not sufficient to establish a legal basis for forfeiture, as well as cases in which the defendant did not understand the consequences of his plea, though he thought that he did.

This case is a textbook illustration of the problems that can arise when the district court fails to make the factual basis inquiry. Petitioner contends that he did not knowingly enter an agreement that forfeited all of his property, even property that he could show was not within the reach of 21 U.S.C. § 853.[14] In essence, petitioner contends that he thought he understood the consequences of his plea, though he did not. Petitioner also contends that neither what he admits nor what the government could prove would provide a legal basis for the forfeiture order.

The government interprets the plea agreement as allowing forfeiture of all of petitioner's property of every kind up to a limit of $1.5 million, and the lower courts accepted that interpretation.[15]

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[14] Petitioner's pro se brief in the court of appeals states (Appellant's Pro Se Opening Br. at 35):

> Defendant would not have entered into the plea agreement or plead [sic] guilty if he shared the government's opinion that the plea agreement denied him of the right to own property and was nothing short of an invitation for a wholesale plundering of everything Defendant owns worth stealing.

The conclusion of the court of appeals (J.A. 324) that petitioner "intended to forfeit all of his property without requiring the government to prove the assets were forfeitable" was made without benefit of any findings on this issue by the district court. The issue was never squarely presented in the district court, where the absence of a factual basis inquiry permitted the parties to maintain conflicting understandings of the plea agreement.

Although the plea agreement stated (J.A. 81) petitioner's agreement that he would not attempt to withdraw his plea and that there were no reasons supporting the withdrawal of his plea, that agreement is not sufficient to bind petitioner to a plea that was not knowing and voluntary.

[15] The court of appeals concluded (J.A. 325) that the plea agreement "unambiguously forfeited all of [petitioner's] property." The district court's effort to amend its original forfeiture order was premised on that court's belated recognition that it had permitted the forfeiture of all petitioner's assets without any determination whether they were tainted or not. *See* J.A. 281-84, 309-10. The court of appeals concluded that the district court's efforts to amend its order were void for lack of jurisdiction. J.A. 317-19.

This interpretation rests principally on paragraph 10 of the agreement, in which petitioner agreed (J.A. 81):

> to transfer his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General including, but not limited to: all real estate; all personal property, including guns, the computer, and every other item now in the possession of the United States; all bank accounts, investments, retirement accounts, cash, cashier's checks, travelers [sic] checks and funds of any kind.

Paragraph 10 was not, however, the only provision in the agreement that dealt with forfeiture. The agreement first mentions forfeiture in paragraph 2, which describes the maximum penalty for the offense to which petitioner pleaded guilty as including "forfeiture of all known assets *as prescribed in 21 U.S.C. § 853* and assets which are discovered at any later time up to $1,500,000." J.A. 79 (emphasis added). In petitioner's view, section 853 imposed an outer limitation on the forfeiture of the property described in paragraph 10, and required a determination of what property was subject to forfeiture. This view finds support in paragraph 9, which stated that petitioner agreed to "provide complete financial disclosure forms requiring the listing of assets and financial interests" and to "identify all assets that were used to facilitate his criminal activity." J.A. 80-81. If all of petitioner's property would be subject to forfeiture, regardless of its connection with any criminal activity, it would not have been necessary for petitioner to identify the particular assets that were tainted, and this provision would have served no purpose.

The court's statements at the Rule 11 hearing did not eliminate this ambiguity, and indeed are wholly consistent with petitioner's understanding of the forfeiture provision. After petitioner was placed under oath, the court asked (J.A. 100):

> Do you understand that all of your property could be forfeited, *the property that is owned by you by reason of any drug transaction*? (Emphasis added.)

Two points about this statement are significant. First, the court appears to limit the potential forfeiture to property "owned by [petitioner] by reason of the drug transaction[s]."[16] Second, the court states that all of petitioner's property "could" be forfeited, lending credence to the view that after the plea was entered there would be a determination whether some – or indeed all – of petitioner's assets were tainted and thus subject to forfeiture. Similarly, at the point when it advised petitioner of the maximum possible penalty, *see* Fed. R. Crim. P. 11(c)(1), the court stated that "all the property that's described in this Count 6 could be forfeited" by petitioner's plea. J.A. 88. Count 6, J.A. 64-67, sought forfeiture of all drug proceeds and all property used to facilitate the CCE, including a list of specified assets; it did not allege that all of petitioner's assets were subject to forfeiture. As described more fully below, *see infra* pp. 25, 31-33, the required advice was misleading because the government ultimately sought to forfeit property not specifically listed in Count 6. *See also* Fed. R. Crim. P. 7(c)(2) (only property listed in indictment or information may be forfeited).

Petitioner states that at the time of his plea he understood the plea agreement to cover only assets that were properly subject to criminal forfeiture, and that he did not understand the agreement to refer to all of his property, substantial

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[16] In response to a question about the effect of the agreement on later-acquired property, the court stated (J.A. 89):

> As I understand it, I think it has to be the product of a drug transaction to be forfeited. Isn't that your understanding, Mr. Truman?

While Mr. Truman, petitioner's trial counsel, agreed with the court (*id.*), his statement at another point in the hearing (J.A. 149) indicates that he understood that the government was seeking substitute assets. Counsel's statement does not, however, indicate petitioner's understanding that the government was claiming substitute assets, nor does it demonstrate that petitioner understood that there would be no further proceedings to determine the extent of the assets subject to forfeiture. This distinction is crucial. An entitlement to forfeit some undefined amount of substitute assets is not necessarily an entitlement to forfeit all of a defendant's assets.

portions of which he asserts are not in fact subject to forfeiture. Appellant's Pro Se Opening Br. at 35. He has identified numerous items he owned that are covered by the government's reading of the plea agreement, which he contends are not subject to forfeiture under 21 U.S.C. § 853, including a Bicentennial coin collection he acquired in the seventh grade, property he purchased as a high school wage earner, bank accounts opened for him as a child, into which no later deposits were made, a complimentary airline ticket issued to him because of an error on the airline's part, and his employee payroll savings plan from concededly legitimate employment. *Id.* at 33-36. Moreover, it is undisputed that petitioner had substantial legitimate income from his employment. J.A. 262-64. Petitioner has consistently maintained that the assets seized by the government far exceed the sum of the proceeds of his drug offense, and thus the substitute assets provision of section 853 does not justify the forfeiture. As discussed *infra* pp. 32-33, after hearing petitioner's presentation at the March 26, 1993 hearing the district court belatedly recognized that its forfeiture order may have encompassed non-forfeitable assets.

Petitioner contends that he would not have pleaded guilty pursuant to the plea agreement if he had realized that the government and the courts would interpret the agreement to include all of his property, rather than only property that could be shown to be forfeitable as a result of his drug violations. *See* Appellant's Pro Se Opening Br. at 35. A factual basis inquiry would have required the court to determine whether petitioner agreed (or the government could establish) that all of his property was indeed subject to forfeiture. If petitioner and the government had different views of the scope of the agreement, that conflict should have become apparent during the factual basis inquiry. The net result would have been to assure that petitioner's plea did not rest on a fundamental misunderstanding of the scope of the forfeiture to which he would be agreeing, forfeiting every item of property he owned on the basis of such a misunderstanding. *See* 18 U.S.C. App., Notes of Advisory Committee on Rules – 1966 Amendment.

II. REQUIRING A FACTUAL BASIS IS NECESSARY TO ENSURE THAT CRIMINAL FORFEITURE DOES NOT EXCEED ITS STATUTORY MANDATE.

A. Section 853 Authorizes Forfeiture for Only a Limited Class of Tainted Assets.

Although the statutory provisions authorizing criminal forfeiture are extremely broad, they are not unlimited. They require a showing of a substantial nexus between the property in question and the criminal violations punishable by forfeiture. Section 853 authorizes forfeiture for the offense to which petitioner pleaded guilty. Section 853(a) provides for the forfeiture of property constituting or derived from "proceeds" of the offense, property used or intended to be used to "facilitate" the offense, and property which afforded control over the enterprise involved in a CCE violation.[17] Section 853(p) allows forfeiture of substitute property only after the government has first identified property that would be forfeited as either proceeds or property used to facilitate an offense, and then has established one of the specified justifications for forfeiting substitute property in lieu of the tainted property.[18] Property that does not fall within section 853(a) or section 853(p) is not subject to forfeiture under section 853. The plain language of section 853 authorizes forfeiture only of tainted assets, not forfeiture of a defendant's entire estate. Thus the necessary concomitant to inclusion of an item of property in an order of forfeiture is a threshold determination that the property is actually subject to forfeiture under section 853.

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[17] Section 853(a) is reprinted at App. 1.

[18] Section 853(p) is reprinted at App. 4.

B. Procedural Safeguards are Necessary to Ensure that Forfeiture Does Not Exceed the Limits Set by Congress as a Result of Governmental Overreaching or Simple Mistake.

Where a plea agreement includes criminal forfeiture, the requirement of a factual basis for the forfeiture component of the guilty plea is a procedural safeguard to ensure that criminal forfeiture does not exceed the broad authority of section 853 and confiscate property without legislative authorization.[19] In *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 502 & n.2 (1993), this Court recognized that procedural safeguards are "of particular importance" in the forfeiture context because of the government's "direct pecuniary interest in the outcome of the proceeding." A similar concern animated Justice Scalia's warning regarding fines, which applies equally to criminal forfeiture:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have

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[19] Although the question presented in this case is the proper interpretation of Rule 11(f), constitutional concerns are also manifest. Separation of powers, double jeopardy, and due process concerns are implicated if federal prosecutors have unchecked authority to pressure criminal defendants to agree to forfeiture that is not authorized by statute. *See, e.g., Whalen v. United States*, 445 U.S. 684, 689 (1980) ("If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.") (footnote omitted); *id.* at 689 n.4 (Due Process Clause "would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law"); *see also Mistretta v. United States*, 488 U.S. 361, 391 (1989) (discussing the "responsibility of federal judges to pronounce sentence within the statutory range established by Congress" in holding that Sentencing Guidelines do not violate separation of powers); *Missouri v. Hunter*, 459 U.S. 359, 366 (1983) (Double Jeopardy Clause's protection against multiple punishments "prevent[s] the sentencing court from prescribing greater punishment than the legislature intended").

> recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.

Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.).

Forfeiture has become a major revenue source for the federal government at a time of high deficits and public pressure for both a balanced budget and tax cuts. More than $3.2 billion was deposited in the Justice Department Assets Forfeiture Fund between 1985 and 1993, the last year for which totals are available. *Annual Report of the Department of Justice Asset Forfeiture Office Fiscal Year 1993* 16.[20] The Justice Department concedes that raising revenue has become "an ancillary benefit" of forfeiture, and that the "reinvestment of forfeiture proceeds in law enforcement has made possible the remarkable growth in federal forfeitures." *Id.* at 15. As one governmental official remarked, the government's aim in forfeiture cases is "'to hurt the bad guy and maximize profit for the Government.'" Lisa Belkin, *The Booty of Drugs Enriches Agencies*, N.Y. Times, Jan. 7, 1990, at A18, col. 1.

The potential for governmental overreaching in the context of forfeiture has long been recognized. Writing more than 150 years ago Joseph Story stated:

> The history of other countries abundantly proves, that one of the strong incentives to prosecute offences, as treason, has been the chance of sharing in the plunder of the victims. Rapacity has been thus stimulated to exert itself in the service of the most corrupt tyranny; and tyranny has been thus furnished with new opportunities of indulging its malignity and revenge; of gratifying its envy of the

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[20] In fiscal 1993, $555.7 million were deposited in the Justice Department Assets Forfeiture Fund, and the proceeds of U.S. Marshals' sales of forfeited property reached a record high of $155.8 million. *Annual Report of the Department of Justice Asset Forfeiture Office Fiscal Year 1993* 16. During the same year federally-forfeited cars, boats, and other property worth $10.2 million were transferred to state and local law enforcement agencies, and property worth $12.8 million was retained for use by federal law enforcement agencies. *Id.* at 17.

> rich, and good; and of increasing its means to reward favourites, and secure retainers for the worst deeds.

3 Joseph Story, *Commentaries on the Constitution of the United States* 173 (reprinted Fred B. Rothman & Co. 1991) (Boston 1833) (footnote omitted).

The Framers acted to limit forfeiture. Both the Constitution and legislation passed by the first Congress rejected the English practice of attainder and forfeiture of estate.[21] Article III provides that "[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." U.S. Const. art. III, § 3, cl. 2.[22] When the

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[21] The concept of forfeiture of estate derives from medieval English law. In feudal times, when a tenant committed a great breach of the bond between the tenant and his lord, he committed a felony and his lands escheated to his lord. 3 William S. Holdsworth, *A History of English Law* 67 (3d ed. 1927). As the definition of felony changed to mean a serious crime, a man convicted of a felony escheated his real property to the Crown for a year and a day, after which the property reverted to the lord; the felon forfeited his personal property to the Crown. *Id.* at 68-69; 1 Frederick Pollock & Frederic W. Maitland, *The History of English Law* 351-52 (2d ed. 1898); 4 William Blackstone, *Commentaries* *385-86 (reprinted Dennis & Co. 1965) (St. George Tucker ed., Phila. 1803). In cases of treason, however, the convicted traitor forfeited both his real property and his chattels to the Crown. 3 William S. Holdsworth, *supra*, at 70-71; 1 Frederick Pollock & Frederic W. Maitland, *supra*, at 351. In addition, the convicted or "attainted" felon was also subjected to "corruption of blood," whereby he lost his ability to inherit, to own, and to devise property. *See* 3 William S. Holdsworth, *supra*, at 69. Corruption of blood was abolished in England in 1834, and the last vestiges of forfeiture of estate were abolished in 1870. *Id.* at 70-71.

[22] There was little debate over this provision. *See* 3 Joseph Story, *supra*, at 172. What discussion there was centered on the definition of treason rather than the appropriate punishment. *See* Nathaniel C. Towle, *A History and Analysis of the Constitution of the United States* 196-98 (reprinted Fred B. Rothman & Co. 1987) (3d ed. Boston 1871).

While the issue is not before the Court in the instant case, forfeiture of estate may be constitutionally prohibited in all felony cases, not merely in treason cases. *See United States v. Grande*, 620 F.2d 1026, 1037-39 (4th Cir.) (in light of irrationality of prohibiting forfeiture of estate for treason but not for lesser offenses, Article III, section 3, clause 2 almost certainly would bar statutory forfeiture of estate) (dicta), *cert. denied*, 449 U.S. 919 (1980). *See generally* Michael P.A. Cohen, Note, *The Constitutional Infirmity of RICO Forfeiture*, 46 Wash. & Lee L.

first Congress enacted various federal criminal offenses, it provided that no conviction or judgment for those offenses "shall work corruption of blood, or any forfeiture of estate." An Act for the Punishment of Certain Crimes Against the United States, Statute 2, ch. 9, § 24, 1 Stat. 112, 117 (1790). As subsequently codified, this provision was made applicable to all offenses. *See* 18 U.S.C. § 3563 (1982).[23]

In developing the forfeiture provisions for RICO and CCE in 1970, Congress drew a sharp distinction between forfeiture of a defendant's entire estate – which continues to be unlawful – and forfeiture of specific assets shown to have been tainted by criminal conduct.[24] Both the CCE and RICO forfeiture provisions define a limited class of tainted assets that may be forfeited[25]; neither authorizes forfeiture of a

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Rev. 937, 950-51 (1989) (constitutional prohibition of forfeiture of estate for treason implicitly precludes it for less serious offenses).

[23] Section 3563 was repealed in 1984. *See* note 24, *infra*. Many states have constitutional or statutory provisions modeled on section 3563. For a list of these provisions, see James R. Maxeiner, Note, *Bane of American Forfeiture Law – Banished at Last?*, 62 Cornell L. Rev. 786, 795 n.162 (1977).

[24] The Senate report accompanying the RICO forfeiture provision enacted in 1970 stated that it would repeal section 3563 by implication. S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969). The Comprehensive Forfeiture Act of 1984, which redefined the property subject to forfeiture and codified the "relation back" and "taint" theories, also explicitly repealed section 3563. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1837, 1987. Congress apparently viewed this as a housekeeping or technical amendment reflecting the fact that the detailed provisions enacted in 1970 and 1984 now defined the scope of forfeiture. Certainly there was no suggestion that the repeal was intended to provide positive authorization of forfeiture of estate, which would be at odds with the careful efforts to define a more limited forfeiture authority.

[25] RICO originally authorized forfeiture of any interest maintained or acquired in violation of the RICO statute, and any interest affording influence over the enterprise involved in the RICO violation. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 943. A 1984 amendment to RICO authorized forfeiture of property constituting or derived from the proceeds of racketeering activity. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 302, 98 Stat. 1837, 2040. CCE originally authorized forfeiture of the profits of the continuing criminal enterprise and any interest affording a source of control over the enterprise. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No.

defendant's entire estate. *See* S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969) (RICO authorizes only "limited" forfeiture of interest in the enterprise involved in the offense "not extending to any other property of the convicted offender"); S. Rep. No. 613, 91st Cong., 1st Sess. 28 (1969) (CCE modeled on Title X of the Organized Crime Control Act of 1969, a bill later adopted as RICO); *see also United States v. Grande*, 620 F.2d 1026, 1037-39 (4th Cir.) (upholding RICO against constitutional challenge under Article III, section 3, clause 2 because it does not authorize forfeiture of estate, but only forfeiture of a limited class of assets with nexus to offense), *cert. denied*, 449 U.S. 919 (1980).

The factual basis requirement will prevent not only unlawful forfeitures, but also unintended forfeitures. In the absence of this procedural safeguard property may be forfeited through simple error. As the court explained in *United States v. Roberts*, 749 F.2d 404, 409-10 (7th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985), the possibility for error in determining whether the statute authorizes the forfeiture of a particular asset "is considerably greater than the possibility of error in determining the maximum jail sentence determined by law."

C. If No Factual Basis is Required, the Prosecution May Use the Plea Process to Work a Forfeiture of Estate Rather Than the Statutorily Authorized Forfeiture of Tainted Assets.

In the absence of a factual basis requirement for forfeiture pursuant to a guilty plea, the prosecution may use the plea process to exceed the limitations imposed by Congress in

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91-513, § 408(a), 84 Stat. 1236, 1265-66, *codified as* 21 U.S.C. § 848(a). In 1984 forfeiture was deleted from section 848, and section 853 was enacted. It provided for the forfeiture of property constituting or derived from the proceeds of drug offenses, property used or intended to be used to commit or facilitate these offenses, and property affording a source of control over a continuing criminal enterprise. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 303, 98 Stat. 1837, 2044-45. In 1986 Congress amended both RICO and section 853 to permit forfeiture of substitute assets. Act of Oct. 27, 1986, Pub. L. No. 99-570, § 1153, 100 Stat. 3207, 3207-13.

section 853, even to the extent of forfeiture of estate. Indeed, in the instant case the government and the courts below interpreted the plea agreement as working a forfeiture of petitioner's entire estate without the necessity of showing any factual basis. Petitioner contends that the agreement so construed covers many assets for which forfeiture is not authorized by section 853, and the district court's postverdict proceedings lend substantial support to his claims. Although the court of appeals concluded (J.A. 318-19) that the district court lacked jurisdiction to conduct these proceedings, the district court's actions leave no doubt that it considered further proceedings necessary to determine which of petitioner's assets were subject to forfeiture under section 853.

At the postverdict hearing on March 26, 1993, petitioner convinced the district court that further evidentiary proceedings were necessary to determine whether its forfeiture order encompassed nontainted as well as tainted assets. Petitioner testified that he had been employed as an accounting supervisor for General Chemical. J.A. 264. His income from this concededly legitimate employment with General Chemical was more than $48,000 in 1989 (plus fringe benefits that reduced his living expenses), and by 1991 his annual salary had increased to almost $53,000. J.A. 262-64.[26] In view of his substantial legitimate income, petitioner argued that it was improper for the government to "proceed on the assumption that all these properties are drug proceeds, because they aren't." J.A. 264. Petitioner conceded (J.A. 265-67) that some of his bank accounts included tainted and untainted assets, and argued that the government was entitled to forfeit only the tainted portion of the assets, which might be calculated by several different methods. J.A. 265-75. For example, petitioner argued that nontainted funds had been used to purchase the Star Valley, Wyoming property. J.A. 266-75.

Noting that "[t]he question before me is whether or not the property that you are forfeiting is tainted or not" (J.A. 281), the district court concluded that a factual hearing would be necessary because "I'm going to know what the facts are before I do a thing." J.A. 283. The court specifically stated, "I think there is a possibility" that the Wyochem bank account was "not tainted." J.A. 292. With regard to the Star Valley property, the court stated, "I don't think we can tell whether the money that came out of the Wyochem account for that property is tainted or nontainted." *Id.*

The court refused to rule on the government's substitute assets theory. J.A. 288. In response to the government's claim that substitute assets were forfeitable because the petitioner had concealed tainted assets, the court responded, "I don't know that he has. You might suspect it, but can you proove [sic] it?" J.A. 289.

After the hearing, the district court drafted an order which stated (J.A. 309):

> [A]fter further review of the plea agreement and the December 23, 1992 Order of Forfeiture, the Court has determined that it may be unjust to enforce the specific forfeiture provisions in the plea agreement. Forfeiture statutes do not mandate forfeiture of property purchased with legitimate funds.

The jurisdictional defect that deprived the district court's order of its effect casts no doubt on the correctness of that court's conclusion that an inquiry is needed to determine whether there is a factual basis for the order forfeiting *all* of petitioner's property, even property acquired before the offense and income from his legitimate employment.

D. In Light of the Disparity in Bargaining Power Between the Government and the Defendant, the Defendant's Agreement to Forfeiture Provides No Real Assurance that It Meets the Criteria of Section 853.

A defendant's agreement to forfeit assets provides no real assurance that the forfeiture meets the criteria of section 853. The severe sentences available under the drug laws, augmented by related weapons and money laundering charges,

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[26] These figures are roughly consistent with the Presentence Report (PSR), which states that petitioner was "a full time accounting supervisor earning approximately $40,000 per year." Presentence Investigation Report 20, ¶ 35.

allow prosecutors to exert tremendous pressure on defendants to forfeit property that falls outside section 853 in exchange for sentence concessions. For example, in this case the prosecutor agreed not to proceed with a count that could have resulted in a mandatory consecutive penalty of 30 years.[27] The disparity in bargaining power created by the current federal sentencing structure creates a significant danger that defendants will be pressured in plea negotiations to forfeit assets that fall outside the limits set in section 853, even to the point of forfeiture of estate, without regard to taint of the included assets. The court of appeals correctly recognized that only a lawful plea agreement is enforceable, J.A. 322-23, but it failed to look beyond the agreement to examine whether the government's interpretation was lawful. This failure contributed to the court's misunderstanding of the role of Rule 11(f).

III. A FACTUAL BASIS INQUIRY IS NECESSARY TO PROVIDE SOME MEASURE OF PROTECTION TO THIRD PARTIES WHOSE INTERESTS MAY BE AFFECTED BY FORFEITURES OBTAINED PURSUANT TO PLEA AGREEMENTS.

The need to protect the property rights of third parties provides a powerful additional reason that a court accepting a guilty plea should be required to satisfy itself that there is a factual basis supporting any forfeiture. As noted in Section II, *supra* pp. 33-34, the drug laws provide federal prosecutors with so much leverage that defendants may agree to forfeit property falling outside the scope of section 853 in order to obtain shorter sentences of imprisonment. The danger that a defendant will agree to forfeit property falling outside the reach of section 853 is even greater when the property sought

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[27] Count 2 alleged that petitioner "used and carried multiple conventional firearms, semi-automatic rifles and handguns, fully automatic weapons, and silencers." J.A. 54-55. The government's brief in the court of appeals argued that petitioner was facing a mandatory consecutive 30-year term on this charge. Br. of Appellee at 3. In addition, the indictment contained other charges that might have increased petitioner's sentence if he had gone to trial. *See* J.A. 38-56, 68-71.

by the government is not in fact his own. As both courts and commentators have recognized, " 'a defendant will have no incentive to avoid agreeing to the forfeiture of assets which he or she has already transferred to a third party.' " 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* § 14.09, at 14-69 (1992), *quoting United States v. De Ortiz*, 910 F.2d 376, 384 (7th Cir. 1990).

A. Third Parties Are Deprived of Important Procedural Rights in the Ancillary Hearing Afforded Under 21 U.S.C. § 853(n).

The erroneous forfeiture of a third party's property pursuant to a guilty plea strips the owner of important procedural rights and imposes significant hardship. Although the federal forfeiture laws provide a mechanism for the assertion of third-party rights,[28] the entry of a forfeiture order pursuant to a plea agreement strips the owner of the right to a jury trial and reverses the burden of proof, so that the government prevails unless the owner carries the burden of proof.[29]

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[28] The owner of property that has been erroneously forfeited pursuant to section 853 is required to assert his claim under 21 U.S.C. § 853(n), which is reprinted at App. 1-3. RICO establishes the same procedure for the adjudication of third-party claims. *See* 18 U.S.C. § 1963(l).

[29] Section 853(n)(6) provides that the court shall amend the order of forfeiture if it determines that the third-party claimant has established his case "by a preponderance of the evidence." The RICO provisions are identical. *See* 18 U.S.C. § 1963(l)(6).

In contrast, if the government had proceeded in a civil forfeiture action, trial by jury would be constitutionally required. *See United States v. One 1976 Mercedes-Benz 280S*, 618 F.2d 453, 456 (7th Cir. 1980); *The J.W. French*, 13 F. 916, 924 (E.D. Va. 1882); 5 J. Moore, *Federal Practice Digest* ¶ 38.31[1] (2d ed. 1987); *see also C.J. Hendry Co. v. Moore*, 318 U.S. 133, 152-53 (1943) (in cases of property seized on land for violations of federal statutes, district courts proceed as courts of common law in rem with trial by jury). With regard to the burden of proof, in a civil forfeiture proceeding the government must demonstrate probable cause to believe that the asset in question is subject to forfeiture at the outset of the proceeding; if this showing is made, then the burden shifts to those who seek to show the res is innocent. *See* 19 U.S.C. § 1615; *see also* 21 U.S.C. § 881(d) (customs laws applicable to civil drug forfeitures). In contrast, under the government's theory it is

B. The Interests of Some Third Parties May Be Extinguished Without Recourse as a Result of Criminal Forfeiture.

While the interests of all third-party owners are adversely affected by forfeiture pursuant to a guilty plea, in some cases the guilty plea will extinguish the third party's property rights completely, and without recourse. Once forfeiture has been ordered pursuant to section 853, the ancillary hearing under section 853(n) appears to be the exclusive mechanism for the recognition of third-party claims.[30] That section, however, does not provide relief for all third parties whose property rights can be affected by a guilty plea and forfeiture. While 21 U.S.C. § 853(n)(2) provides that "[a]ny person . . . asserting a legal interest in property which has been ordered forfeited" may file a petition for a hearing to adjudicate his interest, other provisions restrict the relief offered in a manner that appears to exclude some third-party owners. The statute provides relief for only two classes of persons, bona fide purchasers for value, and persons whose rights vested before the commission of the offense. *See* 21 U.S.C. § 853(n)(6)(A) & (B).

Section 853 contains no general innocent owner provision, and it makes no provision for a third party whose property was forfeited erroneously under section 853 unless he or she falls within one of these two categories. For example, no provision is made for a person who receives property after the date of the offense by means other than a bona fide purchase for value, such as by gift. Even if such a claimant could establish title to the property and the erroneous nature of the forfeiture, section 853 appears to provide no avenue of relief. For these bona fide property owners an erroneous order

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required to make no factual showing before it shifts the burden to a third-party owner when it proceeds by criminal forfeiture pursuant to a guilty plea.

[30] *See* 21 U.S.C. § 853(n)(7) (following the adjudication of all petitions under subsection (n) "the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee").

of forfeiture has the effect of confiscating their property and leaving them with no legal recourse.

C. In the Instant Case the Property Rights of Third Parties Were Prejudiced By Entry of the Forfeiture Order Pursuant to Petitioner's Plea Agreement.

This case illustrates the harmful consequences of allowing the forfeiture of third-party interests pursuant to a forfeiture agreement in a guilty plea that has never been subjected to a factual basis inquiry. One claim asserted at the ancillary hearing in this case concerned two bank accounts held jointly by petitioner and his parents. These accounts were established during petitioner's childhood, and they contained his birthday, confirmation, and allowance money, and money petitioner earned in high school. J.A. 188-89. Since petitioner was a joint owner, the government sought to forfeit these accounts pursuant to its interpretation that the plea agreement included all of petitioner's property, without exception. *See* J.A. 288-89.

Though they had no notice of petitioner's unlawful activities and the funds in the bank accounts were deposited many years prior to those activities, Dr. and Mrs. Libretti were stripped of their right to a jury trial and required to carry the burden of proving that the property in question was not subject to forfeiture. The government deprived Dr. and Mrs. Libretti of these procedural rights by operation of a plea agreement entered in a proceeding to which they were not parties, a proceeding in which the government claims it was not required to show a factual basis for the forfeiture in question. As construed by the government and the courts below, this agreement allowed the forfeiture of bank accounts holding only untainted funds acquired by petitioner's parents many years before the offense in question, and required them to defend their interests without the usual procedural protections.

Dr. and Mrs. Libretti's interest in the Star Valley property was even more dramatically and adversely affected. Petitioner

transferred title to the Star Valley property to his parents after his arrest in an effort to compensate them for the retainer they had paid defense counsel on his behalf. J.A. 307. Petitioner testified at the ancillary hearing that he acquired the Star Valley property with legitimate funds taken from his Wyochem account, and, as noted above, the district court found sufficient merit in petitioner's arguments to necessitate a factual hearing on the matter. *See supra* pp. 32-33; J.A. 307. Assuming arguendo that petitioner can demonstrate that the Star Valley property was not forfeitable under section 853, the government may nevertheless challenge his parents' right to the property if petitioner transferred it to them after the date of the offense in a transaction that did not constitute a bona fide purchase for value. Following the same logic, it appears that the district court erred in returning the diamond ring to petitioner's fiancee, Claudia Porter, because the transfer to her was a gift, not a sale, and it occurred after the offense had begun.[31]

D. Congress Did Not Intend for the Interests of Third Parties to be Disturbed By Criminal Forfeiture Unless the Government First Established a Reliable Basis for the Forfeiture.

In adopting section 853, Congress justified the procedural restrictions on the rights of third-party claimants on

[31] The district court found that since Ms. Porter knew of petitioner's legitimate funds from his employment, she had no way of knowing whether the ring had been purchased with legitimate or illegitimate funds. J.A. 292. The court then sustained her claim with the comment, "I think the Court would be the biggest bully in the world if it went around taking ladies' rings from them. So I'm going to give the ring back." *Id.* In so ruling, the court apparently relied on *United States v. A Parcel of Land, Bldgs., Appurtenances and Improvements, Known as 92 Buena Vista Ave., Rumson, N.J.*, 113 S. Ct. 1126 (1993). That case, however, concerned a civil claim under 21 U.S.C. § 881(a)(6), which includes an "innocent owner" provision that appears to be broader than the bona fide purchaser for value provision in section 853.

the ground that the government would already have established a firm evidentiary basis for the forfeiture of the property at issue. The Senate Report accompanying section 853 explained:

> Since the United States will have already proven its forfeiture allegations in the criminal case beyond a reasonable doubt, the burden of proof at the hearing will be on the third party.

S. Rep. No. 225, 98th Cong., 2d Sess. 209, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3392. While the government will not have met this strict standard if the defendant has pleaded guilty, a factual basis inquiry is necessary to provide at least a minimal justification for the procedural provisions of section 853(n). Indeed, forfeiture of third parties' interests pursuant to a plea agreement accepted by the court without any factual basis may even deprive the third parties of their rights without due process of law.

IV. THE DISTRICT COURT'S FAILURE TO CONDUCT A FACTUAL BASIS INQUIRY INTO THE FORFEITURE COMPONENT OF PETITIONER'S PLEA VIOLATED PETITIONER'S SUBSTANTIAL RIGHTS.

There is no merit to the government's argument (Br. in Op. at 15 n. 10) that petitioner is entitled to no relief even if Rule 11(f) required the district court to find a factual basis for the forfeiture. The district court's failure to make a factual basis inquiry into the forfeiture component of petitioner's plea led to exactly the kind of difficulties that Rule 11(f) is intended to avoid.[32]

[32] The court of appeals properly assumed that the district court made no factual basis inquiry regarding the forfeiture in the instant case. As described in greater detail, *see supra* pp. 32-33, the district court never focused on the scope of the forfeiture agreement, which has been interpreted to include *all* of petitioner's assets, until after petitioner filed his notice of appeal. The only time the court addressed the issue of the factual basis for the forfeiture was at the close of the sentencing hearing. After the court imposed sentence, ordered that petitioner's

Fed. R. Crim. P. 11(h) provides that a court's failure to comply with the requirements of Rule 11 does not warrant relief unless the error "affect[s] substantial rights." The Advisory Committee Notes state that the types of Rule 11 errors that are harmless are "fairly limited." 18 U.S.C. App., Notes of Advisory Committee on Rules – 1983 Amendment. The harmless error rule is not intended to nullify the safeguards provided by Rule 11. *Id.*

A Rule 11 violation is not harmless when the error leads to entry of a plea that was not knowing and intelligent, or produces a record that is insufficient to demonstrate that the plea was knowing and intelligent. In *McCarthy v. United States*, 394 U.S. 459 (1969), this Court explained the purpose of Rule 11 and its constitutional underpinnings. The procedures established in Rule 11 are designed to assist the trial court in determining that the plea is truly knowing and voluntary, and to produce a complete record in support of the voluntariness determination. *Id.* at 465. Rule 11 has a constitutional foundation: "[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *Id.* at 466 (footnote omitted); *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (error was plain on the face of the record when court accepted guilty plea without an affirmative showing that plea was knowing and voluntary).

Petitioner contends that he did not understand the nature of the agreement to which he was pleading (as that agreement

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property be forfeited, remanded petitioner to the marshal's custody, and stated that the hearing was finished, petitioner lodged a pro se objection to the lack of any factual basis for "the whole forfeiture." J.A. 154. At that point the district court stated "the evidence that I heard before me in the two days of trial I think is sufficient to warrant the granting of forfeiture. I think I have no alternative." *Id.* This conclusory statement indicated no recognition of the scope of the forfeiture being sought and the factual issues necessarily raised by the government's attempt to forfeit tainted and untainted assets under a substitute assets theory. There was no finding regarding the factual basis for the legal theory supporting the forfeiture of all of petitioner's property, tainted and untainted. Moreover, the district court belatedly recognized that its forfeiture order may have improperly encompassed property not subject to forfeiture. *See supra* pp. 32-33.

has been construed by the government and the courts below), and that he would not have entered the plea if he had been informed that it forfeited all of his untainted property. This misunderstanding goes to a matter of real substance: the question whether petitioner had agreed to forfeit *all* of his property, even though he had substantial legitimate income and assets.

Petitioner also contends that neither what he admits nor what the government could prove would in fact be sufficient to provide a legal basis for the forfeiture sought by the government. Since petitioner had substantial legitimate income, as well as assets acquired before the offense in question, the government could not justify the forfeiture of *all* of his property by showing that he had committed a CCE violation and derived substantial income from it. *See* 21 U.S.C. § 853(d) (rebuttable presumption of forfeitability invoked only if property was acquired during or after the offense, and defendant had no other likely source for the property). It is undisputed that petitioner possessed substantial legitimate assets.

In light of the prejudicial failure to comply with Rule 11(f) and the resulting lack of understanding on petitioner's part regarding the consequences of his plea, this Court should reverse and remand the case for inquiry into the factual basis supporting petitioner's plea to the forfeiture charge, and for other proceedings as necessary in light of this inquiry.

V. BOTH RULE 31(e) AND THE SIXTH AMENDMENT AFFORD A RIGHT TO JURY TRIAL ON THE NATURE AND EXTENT OF ANY PROPERTY SUBJECT TO FORFEITURE IN A CRIMINAL PROCEEDING.

Both the Sixth Amendment and Fed. R. Crim. P. 31(e) carry forward the common law tradition of submitting forfeiture to the petit jury. A waiver of the right to a jury trial on forfeiture must be express and must constitute the intentional relinquishment of a known right. Petitioner made no such waiver in the instant case. Petitioner was never advised of his right to a jury determination of forfeiture, and neither his

guilty plea nor his plea agreement expressly relinquished that right.

A. At Common Law the Issue of Criminal Forfeiture Was Submitted to the Jury.

Common law juries in both England and the American colonies made findings on criminal forfeiture. Reference works used by English judges and court personnel during the seventeenth and eighteenth centuries record the standard charge to the jury on the issue of forfeiture. For example, in 1799 *The Crown Circuit Companion* instructed that once the jury had finished deliberating, the clerk should advise them as follows:

> *Look upon the prisoner; you that are sworn, what say you, is he guilty of the felony whereof he stands indicted, or not guilty?* If they say *Guilty,* then the clerk asks them, *What lands or tenements, goods or chattels, he* (the prisoner) *had at the time of the felony committed, or any time since?*

Thomas Dogherty, *The Crown Circuit Companion* 21-22 (1799) (emphasis in original). This charge was little changed from the charge recommended more than a century earlier in *The Office of the Clerk of Assize and The Office of the Clerk of the Peace* 71-72 (1676) (microformed in Wing, *Early English Books*, 1641-1700, reel 829).

In his *History of the Pleas of the Crown*, Sir Matthew Hale reports:

> The usage was always upon a presentment of homicide before the coroner, or of flight for the same, or upon a conviction of felony by the petit jury, or the finding of a flight for the same, to charge the inquest or jury to enquire, what goods and chattels he hath, and where they are . . . .

1 Matthew Hale, *History of the Pleas of the Crown* 363 (1778 ed.). Similarly, in describing what property was subject to forfeiture, William Hawkins reported that the question whether a trust created by the accused was forfeitable "is to be left to a Jury on the whole Circumstances of the Case, and

shall never be presumed by the Court where it is not expressly found." 2 William Hawkins, *Pleas of the Crown 1716-21* 450 (1721 ed.).

The English authorities also suggest that the harsh remedy of forfeiture was not popular with juries, and efforts to nullify forfeiture by a verdict finding no property were common. *See The Crown Circuit Companion, supra* p. 42, at 22 (jury commonly found no property); *The Office of the Clerk of the Assize and The Office of the Clerk of the Peace, supra* p. 42, at 72 (same); *cf.* 4 William Blackstone, *Commentaries* *387 (reprinted Dennis & Co. 1965) (St. George Tucker ed., Phila. 1803) (juries would seldom find flight because forfeiture was viewed as too severe a penalty for that offense).

Although the colonial record is sparse, there is evidence that the common law practice of submitting the issue of forfeiture to the jury was followed in the American colonies, and that colonial juries on occasion employed this authority to prevent unjust forfeitures. Juries in colonial New York heard the prosecutions arising out of the Leisler Rebellion and returned verdicts finding no forfeitable lands, tenements, or chattels for any of those convicted, though forfeitable properties were subsequently identified by a writ of enquiry. Julius Goebel & T. Raymond Naughton, *Law Enforcement in Colonial New York* 713 (1944). In fact, colonial juries in New York "almost invariably reported no lands, tenements, or chattels upon conviction." *Id.* at 715. This was true even in the case of a merchant who was not without means. *Id.* It appears that juries were reluctant to "cast upon the county the support of a convict's wife and family." *Id.* at 717. The New York colonial records also reveal at least one instance where officials brought baseless treason charges to raise revenue by forfeiture.[33]

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[33] Goebel and Naughton report Lord Cornbury's charge that the treason prosecution of Bayard and Hutchins was brought "in order that the debts of the Province might be satisfied from the forfeitures." Julius Goebel & T. Raymond Naughton, *supra*, at 714. The Order in Council reversed the sentences and subsequent acts of assembly restored the defendants' property. *Id.*

Criminal forfeitures were rare in this country during the first 180 years after adoption of the federal constitution, but there is evidence that the common law practice of trying criminal forfeiture to the jury carried forward into state law. Sitting as circuit justice and applying the Rhode Island constitution, Justice Curtis concluded that in a criminal forfeiture prosecution

> the owner would be entitled to a trial by jury, and to have the accusation, relied upon to work the forfeiture, set forth substantially, in accordance with the rule of the common law, so that he could discern its nature and cause.

Greene v. Briggs, 10 F. Cas. 1135, 1142 (C.C. D. R.I. 1852) (No. 5,764).

B. The Sixth Amendment Incorporates the Common Law Right to a Jury Determination of the Property Subject to Criminal Forfeiture.

The purpose of the right to trial by jury is "to prevent oppression by the Government" and to provide a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (footnote omitted). As developed more fully at pp. 27-29, *supra*, the potential for raising enormous revenues by forfeiture naturally gives rise to a danger of governmental overreaching. Historically the jury has served as a safeguard against such governmental oppression.

The standard for determining when a jury trial is required is the common law. As Justice Powell observed, "[t]he reasoning that runs throughout this Court's Sixth Amendment precedents is that, in amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to them at common law." *Johnson v. Louisiana*, 406 U.S. 366, 370-71 (1972) (Powell, J., dissenting in Nos. 69-5035 and 69-5046) (footnote omitted). While some of this Court's opinions have departed from the common law precedents in defining the characteristics of trial

by jury,[34] this Court has not retreated from the principle that the Sixth Amendment guarantees a jury trial in cases where that safeguard would have been available at common law.

The historical record discussed above makes it clear that the determination of the property subject to criminal forfeiture was submitted to the jury in England and the American colonies, and that jury verdicts finding no property placed an important check on government authority. Accordingly, the determination of the property, if any, that is subject to criminal forfeiture should be recognized to be a part of the criminal prosecution for purposes of the Sixth Amendment, which guarantees the right to a jury trial "in all criminal prosecutions." U.S. Const., amend. VI.

C. Rule 31(e) Supplements the Sixth Amendment By Requiring a Special Jury Verdict on the Nature and Extent of Property Subject to Criminal Forfeiture.

The Sixth Amendment right to a jury determination of criminal forfeiture is supplemented by Fed. R. Crim. P. 31(e), which requires a special jury verdict on "the extent of the interest or property subject to forfeiture, if any." Special verdict provisions are rare in criminal cases. 18 U.S.C. App., Notes of the Advisory Committee on Rules – 1972 Amendment. Indeed, forfeiture is the only matter on which the Federal Rules of Criminal Procedure require a special verdict. As described more fully above, *see supra* pp. 15-21, Rule 31(e) and companion amendments to Rules 7 and 32 reflect the common law tradition that a defendant had the right to notice, trial, and a special jury finding on criminal forfeiture, which the Rules treat as an element of criminal liability.

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[34] *See, e.g., Williams v. Florida*, 399 U.S. 78, 99 (1970) (since there is no evidence that framers meant to "equate the constitutional and common-law characteristics of the jury," Sixth Amendment does not require jury unanimity).

Rule 31(e) reflects the heightened procedural safeguards that are required when the government seeks criminal forfeiture. It stands firmly on both a common law and a constitutional foundation, carrying forward the tradition of requiring any government claims to criminal forfeiture to be submitted to the jury, the historic safeguard against governmental overreaching.

VI. THE RIGHT TO A JURY DETERMINATION OF CRIMINAL FORFEITURE CAN BE EXTINGUISHED ONLY BY A KNOWING AND INTELLIGENT WAIVER.

A. The Waiver of the Sixth Amendment Right to Trial By Jury Must Constitute the Intentional and Intelligent Relinquishment of a Known Right.

This Court's prior decisions make it clear that an intentional relinquishment – in other words, a knowing and intelligent waiver – is required to extinguish the Sixth Amendment right to trial by jury. The Sixth Amendment cases follow the general rule that the waiver of a constitutional right must be the "intentional relinquishment or abandonment of a known right or privilege." *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The Court applied the standard of a knowing and intelligent waiver to the right to jury trial in *Adams v. United States ex rel. McCann*, 317 U.S. 269, 278 (1942) (citation and footnote omitted, emphasis added), where it stated:

> [O]ne charged with a serious federal crime may dispense with his Constitutional right to jury trial, *where this action is taken with his express, intelligent consent*, where the Government also consents, and where such action is approved by the responsible judgment of the trial court. And whether or not there is *an intelligent, competent, self-protecting waiver* of jury trial by an accused must depend upon the unique circumstances of each case.

The knowing and intelligent waiver standard was articulated to ensure "the validity of a defendant's decision to forego a right constitutionally guaranteed to protect a fair trial and the reliability of the truth-determining process." *Schneckloth v. Bustamonte*, 412 U.S. 218, 236 (1973); *see id.* at 237 (knowing and intelligent waiver standard applies to waiver of right to trial by jury).

Fed. R. Crim. P. 23(a) restates the constitutional right to trial by jury and requires a written waiver of that right. The requirement of a written waiver embodied the existing practice in 1945, when the Rules of Criminal Procedure were adopted. 18 U.S.C. App., Notes of Advisory Committee on Rules. The purpose of this requirement is "to ensure that a criminal defendant is aware of his jury right before waiving it and that any waiver is personal and unequivocal." *United States v. Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984), *aff'd on other grounds*, 471 U.S. 773 (1985). The rule requiring a written waiver implements the constitutional requirement that any waiver of the right to trial by jury be made knowingly and intelligently by the defendant himself.

B. The Waiver of the Right to a Special Verdict Under Rule 31(e) Must Be the Express and Intelligent Relinquishment of a Known Right.

The appropriate standard for a waiver of the right to a special verdict under Rule 31(e) should be considered in light of the history and function of the rule. Rule 31(e) confers an independent statutory right, but it also carries forward a common law tradition stretching back more than 300 years, a tradition that evolved as a significant protection to the accused when the government sought to strip him of his property in the course of a criminal proceeding. Even if this Court chooses not to reach the constitutional issue, it is plain that Rule 31(e) expresses a fundamental judgment about the safeguards that are necessary when the government seeks to impose forfeiture as well as imprisonment on an accused.

Given the fundamental importance of the procedural protection afforded by Rule 31(e), nothing less than a knowing

and intelligent waiver should be sufficient to extinguish the right to a jury determination under this rule. Whether assessed as a common law, statutory, or constitutional right, the function of the special jury verdict under Rule 31(e) is the same. The requirement that all criminal forfeiture claims be submitted to a lay jury provides an important protection against an overzealous or corrupt prosecution. As the Seventh Circuit correctly recognized, the character of the interest protected by Rule 31(e) is so fundamental that a knowing and intelligent waiver standard is appropriate. *United States v. Robinson*, 8 F.3d 418, 421 (7th Cir. 1993).

Two other provisions in the Federal Rules, Rule 11(c)(4) and Rule 23(a), provide additional support for the view that the waiver of the right to a jury determination of forfeiture under Rule 31(e) must be the intentional relinquishment of a known right. Rule 11(c)(4) directs the court to advise a defendant that if it accepts a plea of guilty "there will not be a further trial *of any kind*." (Emphasis added). In light of the right to a jury determination of forfeiture, Rule 11(c)(4) requires that the defendant whose property may be subject to forfeiture be advised of his rights under Rule 31(e), as well as his right to a jury verdict on his guilt or innocence, before he enters his plea. Rule 23(a) also supports the view that a waiver of Rule 31(e) must be knowing and intelligent. The requirement in Rule 23(a) of an explicit personal waiver of the right to jury trial carried forward the existing federal practice, and that practice should apply to the right to a special jury verdict under Rule 31(e). To be sure, Rule 23(a) does not explicitly refer to criminal forfeiture, but it was adopted in 1945, long before the 1970 legislation reviving criminal forfeiture.

C. Neither the Plea Agreement Nor the Court's Comments Informed Petitioner of His Right to a Jury Trial and Special Verdict on Forfeiture, and Petitioner Made No Knowing and Intelligent Waiver of this Right.

The plea agreement acknowledged petitioner's waiver of "various constitutional rights, including the right to a jury

trial," J.A. 80, and the court advised petitioner that his plea would mean the end of the trial, which had commenced several days earlier. J.A. 87. In most cases, that would have been sufficient to dispose of any jury trial issue. In the instant case, however, petitioner had a right not only to have a jury determination of the issue of guilt or innocence, but also a right to have a jury trial and special verdict on the forfeiture issues. His Sixth Amendment right to a jury determination of forfeiture was supplemented by the statutory right to a special verdict under Rule 31(e).

The record contains no indication that petitioner was made aware of his right to a jury trial and special verdict on the forfeiture issues, and equally no indication that he knowingly waived that right. The plea agreement made no mention of the right to a jury determination of criminal forfeiture or a waiver of that right. (To the contrary, as discussed above, *supra* pp. 22-23, the agreement seems to contemplate further proceedings to determine which of petitioner's assets were tainted, though there was no indication of the mechanism for that determination.) The waiver of a jury determination of forfeiture was neither implicitly nor explicitly part of petitioner's guilty plea. A defendant may plead guilty but nonetheless avail himself of the right to contest the forfeiture issues before the jury. *See, e.g., United States v. McKeithen*, 822 F.2d 310 (2d Cir. 1987). In pleading guilty petitioner had two choices: to concede both his guilt and the forfeitability of his assets, or to concede his guilt but to contest the forfeitability of some or all of his assets before the jury. While the first choice would require a waiver of his rights under Rule 31(e), the second would not.

The court's comments at the plea hearing directed petitioner's attention solely to the fact that his plea would waive his right to a jury determination of guilt or innocence. The court noted that a guilty plea would "be the end of this trial," with the result that "the jury is not going to decide whether you're guilty or not." J.A. 87. The court also noted that it would dismiss the jurors, and "that will be that." *Id.* If anything, these comments erroneously suggested that the

jury's function was exclusively to determine guilt or innocence, and that this determination was the only right petitioner was waiving.

Since the record provides no indication that petitioner knowingly relinquished his right to a jury determination of forfeiture under Rule 31(e), he made no valid waiver and his rights under Rule 31(e) were not extinguished by his plea. Accordingly, the district court erred in entering the order of forfeiture, and the court of appeals erred in affirming that order.

CONCLUSION

The judgment of the court of appeals for the Tenth Circuit should be reversed. The case should be remanded for further proceedings in which the district court inquires into the factual basis for the forfeiture component of petitioner's plea and determines whether petitioner knowingly waives his right to a special jury verdict on forfeiture.

Respectfully submitted,

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APPENDIX

21 U.S.C. § 853 provides, in pertinent part:

(a) Property subject to criminal forfeiture. Any person convicted of a violation of this title or title III punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –

> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
>
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

. . . .

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is

the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented

at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

. . . .

(p) If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant –

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

Fed. R. Crim. P. 7(c)(2) provides:

(2) Criminal Forfeiture. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

Fed. R. Crim. P. 11 provides in pertinent part:

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

. . . .

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial. . . .

. . . .

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

Fed. R. Crim. P. 23(a) provides:

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

Fed. R. Crim. P. 31(e) provides:

(e) Criminal Forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

Fed. R. Crim. P. 32(d) provides:

(d) Judgment.

(1) In General. A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.